

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALESSANDRA JULIETTA ROVITO,

Plaintiff,

v.

MATHER DEPARTMENT OF
VETERANS AFFAIRS MEDICAL
CENTER,

Defendant.

Case No. 2:22-cv-00529-DAD-JDP (PS)

ORDER DISCHARGING THE MAY 3, 2022
ORDER TO SHOW CAUSE

ECF No. 4

FINDINGS AND RECOMMENDATIONS
THAT DEFENDANT'S MOTION TO
DISMISS BE GRANTED

ECF No. 3

OBJECTIONS DUE IN 14 DAYS

Plaintiff Rovito, appearing pro se, commenced this case in the Sacramento County Superior Court, alleging that she found a hair on a pastry that she had purchased from a cafeteria run by defendant Mather Department of Veterans Affairs Medical Center. ECF No. 1. Defendant removed this action to his court and now moves to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. ECF No. 3-1.¹ I recommend that defendant's motion be granted and plaintiff's complaint be dismissed with leave

¹ On May 3, 2022, after plaintiff had failed to timely respond to defendant's motion, I ordered her to show cause why sanctions should not be imposed for failure to comply with the court's local rules. ECF No. 4. Because plaintiff subsequently filed an opposition, ECF No. 5, I will discharge the order to show cause.

1 to amend.

2 Legal Standard

3 A jurisdictional challenge under Rule 12(b)(1) of the Federal Rules of Civil Procedure can
4 be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a
5 facial challenge, the moving party asserts that the allegations in the complaint are “insufficient on
6 their face” to establish federal jurisdiction. *Id.* “Whether subject matter jurisdiction exists
7 therefore does not depend on resolution of a factual dispute, but rather on the allegations in [the]
8 complaint.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The court must presume the
9 truth of plaintiff’s factual allegations “and draw all reasonable inferences in his favor.” *Doe v.*
10 *Holy*, 557 F.3d 1066, 1073 (9th Cir. 2009).

11 In a factual challenge, the moving party “disputes the truth of the allegations that, by
12 themselves, would otherwise invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. The court
13 does not simply accept the allegations in the complaint as true. *Id.* Instead, “when challenged on
14 allegations of jurisdictional facts, the parties must support their allegations by competent proof,”
15 *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010), and the court makes findings of fact, resolving
16 any material factual disputes by independently evaluating the evidence, *Friends of the Earth v.*
17 *Sanderson Farms, Inc.*, 992 F.3d 939, 944-45 (9th Cir. 2021).

18 “A document filed pro se is to be liberally construed, and a pro se complaint, however
19 inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by
20 lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Nevertheless, plaintiff bears the burden of
21 establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
22 375, 377 (1994).

23 Discussion

24 In January 2022, plaintiff allegedly purchased a cheese danish from defendant’s café and
25 found it to contain a hair. ECF No. 1 at 8. She alleges that this contamination caused her
26 obsessive thoughts and precluded her from returning to the café. *Id.* She claims that “the legal
27 doctrine of strict liability holds the defendant responsible for their actions or products, without the
28 plaintiff having to prove negligence or fault.” *Id.* Defendant brings a facial challenge to the

1 court's jurisdiction, arguing that plaintiff's claim should be dismissed because defendant—a
2 federal agency—is entitled to sovereign immunity. ECF No. 3-1 at 2-3. Although plaintiff does
3 not plead a basis for federal jurisdiction, she contends in her opposition that the Federal Tort
4 Claims Act ("FTCA") waives defendant's immunity and provides a statutory basis for her claim.
5 ECF No. 5 at 1-2.

6 "The United States, as sovereign, is immune from suit in state or federal court except to
7 the extent that Congress has expressly waived such sovereign immunity." *Tritz v. U.S. Postal*
8 *Serv.*, 721 F.3d 1133, 1136 (9th Cir. 2013) (citing *United States v. Mitchell*, 445 U.S. 535, 538
9 (1980)). "The [FTCA] is a limited waiver of sovereign immunity," *United States v. Orleans*, 425
10 U.S. 807, 813 (1976), making the federal government liable for injuries "caused by the negligent
11 or wrongful act or omission of any employee of the Government while acting within the scope of
12 his office or employment," 28 U.S.C.A. § 1346(b). "The FTCA is the exclusive remedy for
13 tortious conduct by the United States, and it only allows claims against the United States." *See*
14 *F.D.I.C. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1998). "[T]he statutory language 'negligent or
15 wrongful act or omission of any employee of the Government,' is a uniform federal limitation on
16 the types of acts committed by its employees for which the United States has consented to be
17 sued." *Laird v. Nelms*, 406 U.S. 797, 799 (1972). Thus, the FTCA does "not authorize the
18 imposition of strict liability of any sort upon the Government." *Id.* at 803.

19 Plaintiff's lone claim relies on her assertion that defendant is strictly liable for the alleged
20 harm resulting from a hair in her pastry. ECF No. 1 at 8-9. Because tort claims must be brought
21 under the FTCA and the United States has not waived immunity for strict liability claims, her
22 complaint should be dismissed under Rule 12(b)(1). Since an amended complaint could
23 conceivably correct the shortcomings of the current one, I recommend that the dismissal be with
24 leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (holding that
25 district courts must afford pro se litigants an opportunity to amend if it appears possible that they
26 can correct the deficiencies in their complaints).²

27 ² Although plaintiff's allegations appear to be trivial, defendant does not argue that
28 granting leave to amend would be futile.

1 Accordingly, it is hereby ORDERED that the May 3, 2022 order to show cause, ECF
2 No. 4, is discharged.

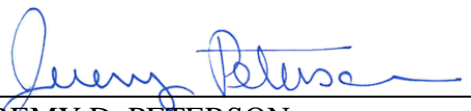
3 Further, it RECOMMENDED that:

- 4 1. Defendant's motion to dismiss, ECF No. 3, be granted.
5 2. Plaintiff's complaint, ECF No. 1 at 5-9, be dismissed with leave to amend.
6 3. Plaintiff be granted thirty days from the date of any order adopting these findings and
7 recommendations to file a first amended complaint.
8 4. The clerk's office be directed to send plaintiff a complaint form.

9 I submit these findings and recommendations to the district judge under 28 U.S.C.
10 § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
11 Eastern District of California. The parties may, within 14 days of the service of the findings and
12 recommendations, file written objections to the findings and recommendations with the court.
13 Such objections should be captioned "Objections to Magistrate Judge's Findings and
14 Recommendations." The district judge will review the findings and recommendations under 28
15 U.S.C. § 636(b)(1)(C).

16
17 IT IS SO ORDERED.

18 Dated: February 13, 2023

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20 JEREMY D. PETERSON
21 UNITED STATES MAGISTRATE JUDGE
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